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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term 1954

No. 740

KEITH M. BEATY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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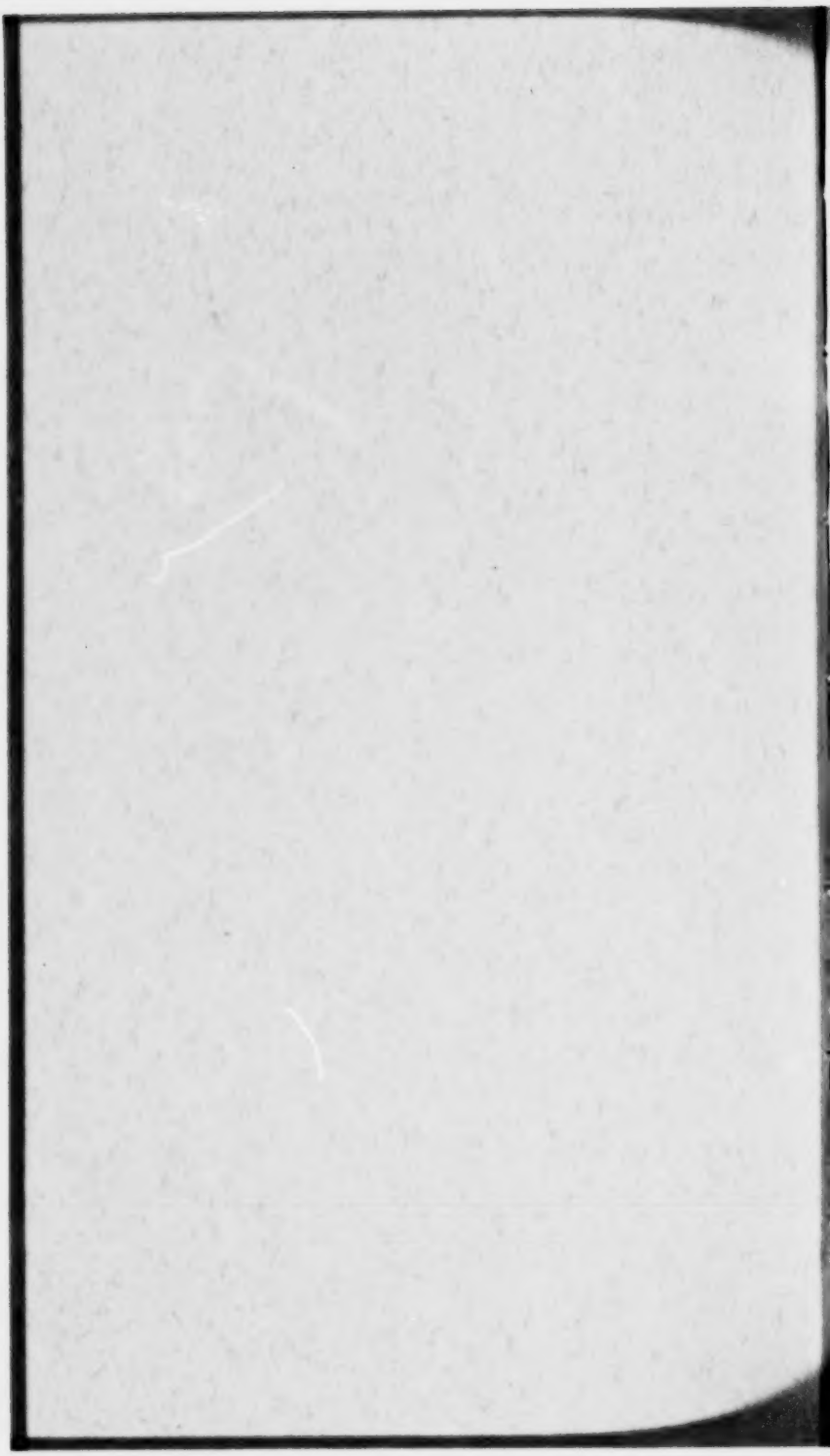

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IN THE

Supreme Court of the United States

October Term, 1954.

No.

KEITH M. BEATY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on March 24, 1955 (App., *Infra,* p. 42, Tr. 75) based on an opinion of said Court rendered on March 24, 1955 (App., *infra,* p. 37, Tr. 69-74) reaffirming the judgment of the United States District Court for the Western District of North Carolina entered January 25, 1954 (R. 551-2, Vol. I)*; and also based on the opinion of the

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* The record references, designated "R" herein are to Volumes I and IV of the original transcript of record filed under No. 209, this Court, October Term, 1954, consisting of appendices of appellant below and proceedings in the Court of Appeals, duly certified.

The references to Minutes of Trial refer to pages of the nine volume record forwarded by the Clerk of the Court of Appeals and duly certified.

The record references designated "Tr." refer to the transcript of record duly certified and forwarded by the Clerk of the Court

Court of Appeals rendered June 14, 1954 (App., *infra*, p. 45, R. 3, Vol. IV),* reported in 213 F. (2d) 712.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals, promulgated June 14, 1954 (App., *infra*, p. 45, R. 3. Vol. IV) is reported in 213 F. (2d) 712.

The opinion of the Court of Appeals promulgated March 24, 1955 (App., *infra*, p. 37, Tr. 69), again affirming the judgment of the District Court entered January 25, 1954 is not yet reported.

JURISDICTION

The first opinion of the United States Court of Appeals for the Fourth Circuit, 213 F(2d) 712 (App., *infra*, p. 45, R. 23, Vol. IV) was promulgated on June 14, 1954. The original judgment of the Court of Appeals was entered June 14, 1954 (App., *infra*, p. 63, R. 23, Vol. IV).

The order of this Court granting certiorari, vacating the judgment of the Court of Appeals entered June 14, 1954 and remanding the case to that Court was entered January 10, 1955 (App., *infra*, p. 44, Tr. 67).

The second opinion of the Court of Appeals was promulgated March 24, 1955 (App., *infra*, p. 37, Tr. 69) and the judgment was entered March 24, 1955 (App., *infra*, p. 42, Tr. 75). An order for stay of mandate

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of Appeals consisting of the appendix to brief of appellant filed in the Court below on February 14, 1955 and a copy of the proceedings in that Court subsequent to the certification of the transcript of record for use in the first application for writ of certiorari, No. 209, October Term, 1954.

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was entered by the Court of Appeals on March 30, 1955 (App. *infra*, p. 43, Tr. 76).

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

The following questions are presented in the light of this court's decisions in the following cases:

Holland v. *United States*, 75 S. Ct. 127
Friedberg v. *United States*, 75 S. Ct. 138
United States v. *Calderon*, 75 S. Ct. 186
Smith v. *United States*, 75 S. Ct. 194

1. Did the court below err by approving the admission in evidence of a government agent's conclusion as to the increase in the net worth of appellant during the indictment period, which conclusion assumed an opening net worth known by the witness to be incorrect and which did not take into account any increase in the market value of assets as shown in the closing net worth statement?

2. Did the court below err by approving the admission in evidence of a government agent's expenditure calculation which totally disregarded $100,000 cash on hand at the crucial beginning period, the amount of said cash having been established by the government's own reliable witnesses, bankers of Charlotte, North Carolina?

3. Did the court below err by approving the refusal of the district court to charge the jury with respect to the government net worth and expenditures computations as requested by petitioner?

4. Did the court below err in permitting the government agents to testify as to expenditures made by petitioner and increases in his net worth, in view of the ad-

missions by these agents that they had not made an adequate or reasonable investigation of leads available to them as to facts brought out by the evidence of other government witnesses which developed the assets of appellant on hand at the crucial beginning period?

5. Did the court below err in approving the action of the district court in allowing the obviously incorrect expenditure and net worth charts prepared by the government agents to remain before the jury throughout the trial and in permitting the jury to take these charts into the jury room with them, although the charts had not been admitted in evidence?

6. Did the court below err by ignoring the decisions of this Court and other courts, holding that a corporation and its chief stockholder are separate legal and taxable entities and did the court below further err by determining that there was direct testimony placing additional taxable income in the hands of the individual, Mr. Beaty?

In the original petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered June 14, 1954 (App., *infra*, p. 63), No. 209, October Term, 1954, eleven questions were presented for the consideration of the Court. In the order entered January 10, 1955, granting certiorari, this Honorable Court vacated the judgment of the court below and remanded the case to the Court of Appeals for consideration in the light of *Holland* v. *United States, Friedberg* v. *United States, Smith* v. *United States,* and *United States* v. *Calderon,* decided by this Court December 6, 1954.

The following questions presented in the original petition for certiorari, No. 209, not involved in the net worth issues decided by this Court on December 6, 1954, are most respectfully presented and reasserted as follows:

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7. Did the trial court depart from the accepted and usual course of judicial proceedings and deprive the petitioner of his constitutional right to a fair and impartial trial by jury by admonishing and warning the jury that they might be watched by some agency and "amenable to punishment for having desecrated the oath of your office"? (App., *infra*, p. 66, Minutes of Trial pp. 53 and 54, Question 1 of original petition, page 2.)

8. Did the court below err in holding and deciding that the United States District Court for the Western Judicial District of North Carolina had jurisdiction to indict and try the petitioner although his income tax returns were filed at Greensboro, North Carolina at the office of the Collector of Internal Revenue within the jurisdiction of the United States District Court for the Middle Judicial District of North Carolina and the offense charged in the indictment was alleged to have been committed on the dates the income tax returns were filed? (Question 7 of original petition, page 3.)

9. Did the District Court err by departing from the accepted and usual course of judicial proceedings by instructing one juror in the absence of the other eleven as to the propriety of a recommendation for mercy and in promising that he would follow the recommendation? (Question 9 of original petition, page 4.)

10. Was petitioner deprived of a substantial right under Rule 30 of the Federal Rules of Criminal Procedure, due to the failure of the trial court to exclude the jury and allow petitioner's counsel to make objections to the charge of the court out of the hearing of the jury? (Question 10 of original petition, page 4.)

11. Was the petitioner deprived of a substantial right under Rule 30 of the Federal Rules of Criminal Procedure where prior to the argument to the jury of defendant's

counsel the trial court, pursuant to said Rule 30, stated that he would give a certain requested charge and, after argument to the jury, changed his mind and refused to give the charge as promised? (Question 11, original petition, page 4.)

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Statutes

United States Code, Title 28, Section 1254(1) (App., infra, p. 64).

Internal Revenue Code, Title 26:

Section 145(b) Penalties (App. infra, p. 64).

Section 53(b) To Whom Return Made (App., infra, p. 64).

Constitutional Provisions

Article VI of Amendments to The Constitution of the United States of America (App., infra, p. 65).

Federal Rules of Criminal Procedure

Rule 30, 18 U.S.C.A. following Section 687 (App., infra, p. 65).

Federal Rules of Civil Procedure

Rule 51, 28 U.S.C.A. following Section 723 (App., infra, p. 65).

STATEMENT OF THE CASE

On March 4, 1952 the petitioner was indicted under Section 145(b), 26 U.S.C. in the United States District Court for the Western District of North Carolina, at Charlotte, North Carolina for attempting to defeat and

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evade a large part of his individual Federal income taxes for the calendar years 1945, 1946 and 1947 (R. 1-4, Vol. I), Case No. 338.

On the same day, the petitioner was indicted as President of Beaty Service Company, Inc. for causing the corporation to attempt to defeat and evade a large part of its corporate income taxes for the fiscal years ended June 30, 1946, 1947 and 1948 (R. 13-16, Vol. I), Case No. 339. As stated by the District Court, this was in reality a charge against the corporation (R. 13, Vol. I).

The District Court denied the right of the United States to join the charges (R. 17, Vol. I) and the United States Attorney elected to try the individual case, No. 338.

The respondent contended that petitioner had failed to report on his tax returns income derived from two principal sources, Lancaster Distributing Company, an individual enterprise operated by E. C. Pundt, and Beaty Service Company, Inc., a corporation of which petitioner was the principal officer and stockholder.

The income from Lancaster was reported by Pundt. The Government took the position that it should have been reported by Beaty although Pundt, a Government witness, testified that he paid the income tax on the profits from the business and never paid to or kicked back any part of the profits to Mr. Beaty (R. 121, Vol. I, p. 1141 Minutes of Trial). Beaty received a salary (R. 120, Vol. I, p. 1124, Minutes of Trial). The Government concedes that the salary was reported on Mr. Beaty's tax return.

The United States also based its case in part on the proposition that Beaty Service Co., Inc. omitted from its books and tax returns monies which allegedly should have been received by the corporation from the operation of taxicabs and the sale of obsolete or wrecked cabs or auto-

mobiles. The respondent attempted to prove these alleged omitted receipts by circumstantial evidence and again attempted to prove by circumstantial evidence that petitioner had received these alleged corporate receipts and diverted them to his own use. The United States contended that the corporation was taxable in full on these alleged omitted receipts (R. 321, Vol. I) and that petitioner, the individual, was also taxable in full on the full amount of these alleged receipts (R. 321, Vol. I).

The Government based its case in this regard on charts, formulas and computations prepared by Revenue Agents Cline and Parrish purporting to show the monies which the corporation would have received if it had operated its fleet of 32 to 34 taxicabs full time. This was pure circumstantial evidence refuted by the testimony of the Government's own witnesses—seventy-eight taxicab drivers who testified that the cabs did not operate full time; that they were wrecked; had to be repaired; that the drivers themselves failed to pay into the company monies due and that the drivers drank, gambled, and did not work regularly or pay regularly (R. 109-111, Vol. I). The attempt of the Government to show that the petitioner received or diverted any of such alleged receipts by the corporation was again pure circumstantial evidence. There was no direct evidence in the case showing that Mr. Beaty received or diverted any monies of the corporation. Government Agent Parrish admitted that no monies were paid Mr. Beaty from the sale of automobiles (R. 145, Vol. I). This testimony of the Government agents was received in evidence over the objection of petitioner's counsel and the Court denied petitioner's motion to strike the testimony of Government Agents Parrish and Cline (R. 353-354, Vol. I).

The trial court explained his position and stated to the jury, "• • • if someone was stealing from Mr. Beaty,

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it was his duty to find it out and prosecute them. * * *" (R. 149, Vol. I). We all know that one who is the owner or has to be president of a corporation, that whether anything would be paid directly to him or to someone for him, the corporation would supposedly receive that amount and be chargeable therewith if it was income." (R. 149, Vol. I).

The Government witness Parrish, on cross-examination, admitted that in order to justify the additional net income attributed to this petitioner through the Beaty Service Company, Inc., that taxicabs of the Beaty Service Company, Inc. would have had to operate approximately 100% of the time and that in a period of two years Beaty Service Company would have had to have more cabs than it actually licensed to derive the monies which the Government agents computed as income (R. 177, Vol. I).

The Government offered no direct evidence placing unreported income from either Lancaster or Beaty Service Co., Inc., in the hands of Mr. Beaty. Lancaster and Beaty Service Company were used by the United States to show the sources from which Beaty could have derived the alleged unreported income.

The Government sought to place the alleged unreported income in Beaty's hands by a net worth calculation of Special Agent Parrish and an expenditures computation of Special Agent Cline.

Parrish testified that in his opinion Beaty's net worth had increased $145,800.10 from December 31, 1944 to June 30, 1946 (Tr. 29). He based this conclusion on two financial statements furnished by petitioner to Pabst Blue Ribbon Company purporting to show his financial status based on the value of stocks and securities owned by Beaty on December 31, 1944 and June 30, 1946 (Tr. 28). Parrish stated that in his opinion it would have been im-

possible under the income reported by Beaty for his net worth to have increased $145,800 from 1944 to June of 1946 (Tr. 29).

The evidence showed that as of November 14, 1944, Beaty had on hand and deposited with a bank as collateral, stocks having a value of $252,492, an amount in excess of the value as shown on the 1944 financial statement. (Opinion of court below, App. p. 39).

Government Exhibit 364 (Tr. 27 and 28) shows stocks and bonds having only a value of $146,648.25 on hand as of December 31, 1944. This is $105,843.75 less than the $252,492.00 figure shown above. However, Parrish based his calculations of increase in net worth on the small beginning figure of $146,648.25.

Agent Parrish admitted that he, himself, believed that the petitioner had on hand at the close of 1944 additional and further stocks than was shown in the financial statement (Tr. 36). He further admitted that he had not checked the increase in the value of the stocks between 1944 and 1946 (Opinion of court below, App. 39, Tr. 37).

Respondent substantially relied upon a computation prepared by Special Internal Revenue Agent Cline purporting to show that during the years 1945 and 1946 petitioner expended respectively $32,855.60 and $56,595.67 in excess of his reported receipts. The agent, Cline, admitted under cross-examination that he failed to give petitioner credit in his (the agent's) computations for cash monies that petitioner had on hand at the beginning of the year 1945 (Tr. 19).

This in spite of the fact that the Government's own witnesses, bankers, testified that petitioner had on hand at the beginning of the period, January 1, 1945, $100,000 in cash (Tr. 4-8). Seventy thousand of this money was released to petitioner by the bank on March 20, 1945 (Tr.

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8). Witness Bizzell testified that $70,000 in cash was deposited by defendant as collateral on one occasion and $30,000 on others. He said these sums represented "different money" (Tr. 4).

Witness Kerr testified that $70,000 in cash was released to the defendant by the bank within three months after the opening of the tax period (Tr. 8).

Cline testified (Tr. 19):

• • • •

"Q Now we will take this one down (Removes chart from blackboard). In your calculation of these figures, do you give Mr. Beaty credit for having one nickel in his pocket on January 1, 1945? (Referring to Government's Exhibit No. 33)
"A No, sir.
"Q Not even one penny?
"A No, sir."

• • • •

Cline further testified that he could not find where the money for the expenditures came from. He assumed that the petitioner had earned it (Tr. 23). Cline admitted that he did not examine Beaty's safe deposit box to see if he had any money (Tr. 20).

The witness Cline prepared a chart showing his expenditure calculations which was not introduced in evidence but was over the defendant's objection exhibited to the jury throughout the trial (Tr. 10).

The petitioner moved to strike the testimony of both the Agents, Parrish and Cline (Tr. 40, 41) and also moved for judgment of acquittal (Tr. 41, 42, 53, 62, 63). Both motions were denied by the Court.

When the jury retired, it asked for all the charts. The defendant's counsel stated he had no objection to the jury having all the "evidence" (Tr. 61). Cline's chart, although

not in evidence, was taken by the jury with the other charts.

Petitioner duly and timely filed a motion to dismiss the indictment on the ground that the District Court for the Western District of North Carolina was without jurisdiction. This motion was denied by the District Court (R. 12, Vol. I).

The office of the United States Collector of Internal Revenue for the District of North Carolina was, during the period involved in this case, and is now located at Greensboro, North Carolina. The office of the said Collector (now known as Director) and the City of Greensboro, North Carolina were and are located within the judicial district of the United States District Court for the Middle District of North Carolina. The office of the Collector and the City of Greensboro are not within the jurisdiction of the District Court of the United States for the Western District of North Carolina where this petitioner was indicted and tried (App., infra, p. 29, R. 5, Vol. IV).

Pursuant to Section 53(b) of the Internal Revenue Code, supra, the petitioner filed his individual Federal income tax returns for the years 1945, 1946 and 1947 with the Collector of Internal Revenue for the District of North Carolina at the Collector's office located at Greensboro, North Carolina, within the judicial district of the United States District Court for the Middle District of North Carolina.

Immediately after the Jury was impaneled the Court warned the jury that it might be watched "by some agency that had in mind the prime purpose of seeing that a fair verdict" was rendered in the case and that a member of the Jury might be amenable to punishment. (Page 49 Appendix, infra, page 53 minutes of trial.) Thereupon

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petitioner moved for a mistrial (page 58 minutes of trial) which motion was denied by the District Court.

At the outset of the trial respondent was permitted to place before and exhibit to the Jury large placards or charts showing the conclusions and computations of the Government Agents. The defendant's objections to these charts and computations were overruled by the District Court (R. 132, Vol. I).

At the close of the Government's testimony (R. 354, Vol. I) and again at the close of all the testimony (R. 485, Vol. I) the petitioner moved for judgment of acquittal, which motions were denied by the Court.

Trial of the case was commenced on November 30, 1953. The trial was concluded on the 18th day of December, 1953, on which date, the Jury returned the following verdict: (R. 535, Vol. I) "We of the jury find the defendant guilty as charged on all counts, but we recommend to this Court that due to health condition of Mr. Beaty that mercy be—that we would recommend mercy." Previous to the finding of the jury, one juryman left the jury room (App. 52), came into the Courtroom with permission of the Court, and sought to speak to the Court privately, and then upon being told by the Court that he would have to make a public statement, he said, "I just want to know of the Court if any recommendation can be made because of health condition." The Court replied, "A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court." (R. 534, Vol. I).

Following the verdict of the jury, the defendant moved for a new trial and for arrest of judgment (R. 537, Vol. I). The defendant also renewed his motions to dismiss the indictment and for judgment of acquittal. The Dis-

trict Court overruled the motion for a new trial and in arrest of judgment and also overruled defendant's renewed motions for the dismissal of the indictment and for judgment of acquittal (R. 543-545, Vol. I).

The judgment of the District Court was that the petitioner be imprisoned for a period of two years on each Count (R. 551, Vol. I), the sentences to run concurrently. In addition the petitioner was fined $20,000 and required to pay all costs of the trial (R. 551-2, Vol. I).

The petitioner duly and timely filed an appeal from the judgment of the District Court to the United States Court of Appeals for the Fourth Circuit.

On June 14, 1954, the Court of Appeals rendered an opinion affirming the judgment of the District Court (App., infra, p. 45, R. 3, Vol. IV). Judgment was entered by the Court of Appeals on June 14, 1954 (App., infra, p. 63, R. 23, Vol. IV).

Petitioner duly and timely filed with this Honorable Court a petition for a writ of certiorari to review the judgment of the Court of Appeals.

On January 10, 1955 this court granted the petition for certiorari; vacated the judgment of the court below; and remanded the case to the Court of Appeals, "for consideration in the light of *Holland* v. *United States, Friedberg* v. *United States, Smith* v. *United States,* and *United States* v. *Calderon,* decided by this Court December 6, 1954." (App. infra, p. 44)

Thereafter the Court of Appeals set the case for reargument and permitted the filing of briefs by both sides on the net worth issues. On March 24, 1955 the court below promulgated an opinion again affirming the judgment of the District Court (App. infra, p. 37). Judgment was entered by the Court of Appeals on March 24, 1955 (App., *infra,* p. 42)

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REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals involves substantial questions of Federal law, particularly vital in criminal tax evasion cases in which the Government relies on net worth and expenditures conclusions and computations to place alleged unreported income in the hands of the defendant taxpayer and to demonstrate increases in net worth or expenditures in excess of reported income.

It is respectfully submitted that the Court below erred by failing to properly apply the principles laid down by this Court in *Holland* v. *United States*, supra; *Friedberg* v. *United States*, *United States* v. *Calderon*, supra; and *Smith* v. *United States*, supra.

In the four cases mentioned the cash or assets on hand at the crucial beginning point of the taxable period was shown either by the evidence presented by the taxpayer or by the admissions of the taxpayer made to the special agents of the Internal Revenue Service.

In the *Beaty* case, the actual cash amounting to $100,000 on hand as of January 1, 1945 (the crucial beginning period here) was proved by the Government's own witnesses. Government witness, Bizzell, Assistant Treasurer of the American Trust Company, Charlotte, North Carolina, testified that $70,000 cash had been deposited with the bank as collateral on one occasion, just prior to December 31, 1944 and $30,000 in connection with other transactions. He said these sums represented "different money" (Tr. 4).

Government witness Kerr, Vice President of the same bank, confirmed the evidence of Bizzell as to the monies on hand at the beginning of the period and testified that $70,000 of this cash was released to Beaty on March 20,

1945, three months after the crucial beginning period (Tr. 8).

The explanation of the *Beaty* case is simple. The Government agents sought to place taxable income in Beaty's, the individual's, hands by showing that in 1945 he spent $32,855.60 more than he reported and $56,595.67 more than be reported in 1946. However, the agents Cline and Parrish stated that they had given Mr. Beaty no credit for the cash on hand at the beginning of the period, amounting to approximately $100,000, as shown by the testimony of their own witnesses (Tr. 19-30).

Agent Cline testified (Tr. 19):

> "Q Now we will take this one down. (Removes chart from blackboard) In your calculation of these figures, do you give Mr. Beaty credit for having one nickel in his pocket on January 1, 1945? * * *
> "A No sir.
> "Q Not even a penny?
> "A No sir."

Thus the agent discredited his own computation by which he sought to show the excess of expenditures over reported income during the taxable period.

Special Agent Parrish presented the net worth conclusions of the Government. He testified that in his opinion the net worth of the petitioner had increased $145,800 from December 31, 1944 to June 30, 1946 (Tr. 29). He based this conclusion on two financial statements furnished by petitioner to Pabst Blue Ribbon Company purporting to show his financial status based on the value of stocks and securities owned by Beaty on December 31, 1944 and June 30, 1946. The Government evidence showed that Beaty had, on November 14, 1944, deposited with a bank, as collateral, stocks having a value of $252,492, an amount in excess of the value as shown on the 1944 financial statement (Opinion of Court below, App. *infra*, p. 39).

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Government Exhibit 364 (Tr. 27 and 28) shows stocks and bonds having only a value of $146,648.25 on hand as of December 31, 1944. This is $105,843.75 less than the $252,492.00 figure shown above. However, Parrish based his calculations of increase in net worth on the small beginning figure of $146,648.25.

Parrish admitted that he, himself, believed that petitioner had on hand at the close of 1944 additional and further stock than that shown on the financial statement (Tr. 36). He further admitted that he had not checked the increase in the value of the stocks between 1944 and 1946 (Opinion of Court below, App. *infra*, p. 39, Tr. 37). He further admitted that, like Cline, he had not given petitioner credit in his net worth conclusion for any of the $100,000 cash on hand as of January 1, 1945 (Tr. 30). Here again the Government witness discredited his admittedly inaccurate net worth conclusion.

Can this defendant, under the decisions of this Court in *Holland*, *Friedberg* and *Smith*, supra, be convicted on the expenditures basis by disregarding the known cash on hand at the crucial beginning of the period?

This question was answered by this Court in *Smith* v. *United States of America*, No. 52, 75 S. Ct. 194 at page 198, as follows:

> "• • • Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed. Holland v. United States, 348 U.S. 75, 75, S. Ct. 127. • • •"

The Court below brushed aside the discredited and inaccurate expenditure and net worth calculations, charts, and conclusions of the Government agents on the ground that there was additional testimony by the Government that the cash items were not used in making the expendi-

tures listed on Cline's computation and chart (App., infra, p. 40). The Court apparently referred to the testimony of Cline in this regard. This testimony amounted to a mere admission by Cline that he did not know what funds were used to make the expenditures. Cline testified that Beaty had spent the money in years previous to January 1, 1945 (Tr. 19). How could the agent make such a statement when the Government witnesses testified as to the $100,000 cash on hand as of January 1, 1945 and the release of $70,000 to the taxpayer in March of 1945? Cline admitted that he heard only part of the testimony by the bankers (Tr. 21).

Cline testified that he didn't know where the money came from for the expenditures and since he could not find where the money came from, he assumed that the taxpayer had earned it during the indictment period (Tr. 23-26). Thus he disregarded completely the cash on hand at the crucial beginning period. He admitted that he did not examine the defendant's safe deposit box to see if he had any money (Tr. 20).

Accordingly, it is respectfully submitted that under *Holland*, *Smith*, *Friedberg* and *Calderon*, supra, the Court below erred by approving the action of the District Court in:

(a) Overruling the petitioner's objections to the expenditures testimony (Tr. 12-17);

(b) Overruling the motions of petitioner to strike the evidence and the conclusions of Agents Cline and Parrish (Tr. 40, 44);

(c) Overruling the petitioner's motions for judgment of acquittal and for a new trial (Tr. 52, 53, 62).

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(d) Refusing to charge the Jury with respect to the Government computations of expenditures and net worth as requested by the petitioner (Tr. 54, 56, 58).

Petitioner requested the following instructions, which were refused:

"Request No. 11: You are instructed that you should take under consideration in your deliberations the testimony of Special Agent Cline that in computing the defendant's expenditures for the years 1945, 1946 and 1947, he failed to take into consideration the fact that the defendant had on hand as of January 1, 1945, $100,000.00 in cash, and that during March of 1945, the bank released to the defendant $70,000.00 of the cash which the defendant had on hand as of January 1, 1945. * * *" (Tr. 54).

"Request No. 26: You are further instructed that the conclusions and computations of the expert for the United States are not evidence and cannot be taken as true and correct unless supported beyond a reasonable doubt by evidence adduced or presented by the United States during the trial of the case." (Tr. 57)

"Request No. 27: When the United States relies upon circumstances of increased net worth, or expenditures in excess of reported income, to establish income tax evasion, the United States must produce evidence that excludes all possible available sources of known taxable income from which the increased net worth and the excess expenditures could have been derived." (Tr. 56)

(e) Permitting over the objections of petitioner the obviously incorrect charts of expenditures and net worth prepared by the Government agents to be shown to the Jury; to remain before the Jury throughout the entire trial, and to be taken into the Jury Room by the Jury, although not introduced in evidence by the Government.

(f) Permitting the testimony of the Government agents as to expenditures and net worth to remain in evidence over objection of petitioner although these agents admitted that they failed to make adequate investigation of the leads available to them showing stocks, securities and cash on hand at the crucial beginning period proved by the evidence of other Government witnesses, bankers of Charlotte, North Carolina.

The Court below relied on the proposition that in this case there was independent evidence tending to show that the taxpayer's assets greatly increased during the indictment period, citing *United States* v. *Calderon,* supra.

In the *Calderon case*, the independent evidence consisted of the financial history of the defendant during the prosecution years, the testimony of the defendant as to cash on hand at the crucial starting point, and the fact that defendant's own testimony showed insufficient cash or assets on hand at the beginning point to absorb the increase in assets and the expenditures shown by the Government. No such situation exists in the *Beaty* case.

The financial history of the petitioner was shown by the Government's own evidence from bankers, proving $100,000 in cash and $252,000 in stocks and securities on hand at the beginning point. These cash and security assets were more than sufficient to absorb the expenditures and net worth increases testified to by the Government witnesses Cline and Parrish. Furthermore there was no evidence of record showing expenditures or net worth increases except the discredited conclusions and computations of the two Government agents.

We respectfully submit that this case is a striking and typical example of the dangers and pitfalls in the net worth and expenditures methods of placing additional income in a defendant's hands, which dangers and pitfalls

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were pointed out with exactness by this Court in *Holland, Smith, Friedberg* and *Calderon* on December 6, 1954.

II.

The decision of the Court below is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Dupree* v. *United States,* No. 14659, Prentice-Hall Federal Tax Service 1955, Paragraph 72,382. In that case the Fifth Circuit reviewed the judgment of the District Court in the light of this Court's decisions of December 6, 1954 in the net worth and expenditures cases.

In *Dupree,* the Government relied upon evidence that during the years in question taxpayer's expenditures greatly exceeded the funds that were available to him. The court said that it had delayed decision until the Supreme Court decided the *Holland, Friedberg, Smith* and *Calderon* cases, and declared:

> "Although the four cases just decided by the Supreme Court involved prosecution on the increase in net worth method, much of what is said there is applicable to a prosecution in which the Government undertakes to prove that the taxpayer knowingly and wilfully attempted to defeat and evade a large part of his income tax by showing that expenditures during the prosecution years in question exceeded the taxpayer's available funds."

In *Dupree,* the Government introduced evidence that in 1940, five years before the prosecution years, defendant had a net worth of $49,500.00. Yet, in its expenditures computation, the Government's expert did not include this sum among the "available assets" at the beginning of the prosecution years.

The Court said that in an expenditures computation, the Government must show three elements:

"The first element that must be established in this type of prosecution is what funds are available to the taxpayer at the opening date of the prosecution year. In this respect it is similar to a so-called 'net worth' case. If there is no established figure showing the source from which expenditures during the year can be made, or the complete lack of such a source, then there is no relevance to proof of expenditures during the year, no matter how large they may be. See *Bryan* v. *United States*, 5th Circ., 175 F. 2d 223.

"The second element that must be shown is the 'available funds' acquired during the year, as disclosed on the income tax return filed for the year, since 'expenditures' matching such funds indicate only what would be expected of a taxpayer who filed a correct return.

"In order to prove a failure to report the full amount of income by the use of this particular method, the Government must then show 'expenditures' during the year in excess of the two items mentioned above, i.e., available funds at the beginning of the year and funds becoming available during the year and which were reported on the tax return.

"The Government has still a further burden in this type of case. It is elementary that there are sources of funds that make their receipt non-taxable to the recipient. The Government, in proving its prima facie case must therefore exclude such sources of available funds by affirmative evidence."

The Court held that the Government had not established the opening available funds, since it did not give credit for the assets shown to have been available or negative the contention of the accused as to the existence of substantial available assets at the beginning of the computation period. The Court said:

"Here the Government in the presentation of its case merely ignored the claim of assets made by the taxpayer as testified to by the witness Gamel. Having introduced evidence in the nature of statements

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by the accused that he had specified assets of a cost in excess of $49,500, plus a lot which he later sold for $6,000, plus bank accounts which were not identified, and having proved by a bank employee that the accused also owned a mortgage debt for $1205, and that the accused and his wife had bank accounts in his bank totalling approximately $800, the Government sought to build up a discrepancy between available resources and expenditures between January 1, 1940 and December 31, 1945, by showing (1) substantial personal spendings and (2) increases in five categories of assets—bank balances, purchase of U. S. Savings Bonds, purchase of U. S. Treasury Notes, increase in mortgages owned, and purchase of real estate, without attempting to account for any possible rearrangement of assets as to the $49,500 or for a penny of the $65,000 to $80,000, which appellant claimed he had on hand, or for any savings of his wife."

The judgment was reversed, and the case remanded for a new trial.

Dupree is on all fours with the *Beaty* case. The Government, in both cases, showed available assets, and then gave no credit for them in its computation. However, the *Beaty* case is much stronger for the taxpayer than *Dupree,* because the large amount of cash and other assets on hand at the beginning point was proved by the Government itself. There was no testimony by the taxpayer himself which might be subject to doubt.

III.

The Court below, as in its previous opinion, 213 F. (2d) at p. 720, relied on the proposition that there was *no explanation* for the use of cash sums as collateral for loans (App. *infra*, p. 40). The Court below would apparently shift the burden of explanation or proof to the taxpayer contrary to the principles enunciated by this Court in *Holland* v. *United States*, supra.

It is respectfully submitted that the petitioner was not called upon to explain the accumulation of assets prior to the years involved and that under the *Holland* and *Friedberg* decisions of this Court, it was reversible error for the Court below to disregard the undisputed Government evidence of the cash on hand at the beginning of the period and demand from the defendant an explanation of this cash accumulation.

As pointed out by Mr. Justice Clark in the *Holland* case: "Were the taxpayer compelled to come forward with evidence he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness." The Court further stated that this danger must be minimized.

Certainly the Government Witness Cline attempted before the Jury to shift the burden of proof to the defendant. As he admitted upon cross-examination, "In the absence of any information as to where it come from, your Honor, *we would charge it to you as income until you proved what it was.*" (Tr. 26) (Italics added). This being the attitude of one of the Government's experts, can it be doubted that there was great danger the Jury would adopt the same theory?

The Jury received the full force and impact of Cline's discredited charts (not introduced in evidence) and his testimony and would be allowed under the decision of the Court below to assume that the figures of the Government agents were correct without an explanation from the taxpayer.

IV.

The court below erred by ignoring and failing to follow the decisions of this Court and other courts, holding that a corporation and its chief stockholder are separate tax-

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able entities. The court below also erroneously held that corporate income was taxable to the individual stockholder (App., *infra*, p. 41).

It is well established that for purposes of taxation, a corporation is a separate legal entity, even though one person may own all its capital stock, and dominate its affairs. This was held unequivocally by the Supreme Court of the United States in *Moline Properties, Inc.* v. *Commissioner of Internal Revenue*, 319 U.S. 436, 87 L. Ed. 1499 (1943). This Court, speaking through Mr. Justice Reid, said at 319 U.S. 438, 439:

> "Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity."

The same principle has been laid down in many other cases. See, for example, *Dalton* v. *Bowers*, 287 U.S. 404, 410; 77 L. Ed. 389 (1932); *Burnet* v. *Commonwealth Improv. Co.*, 287 U.S. 415, 77 L. Ed. 399 (1932); *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, 93 L. Ed. 779 (1949); *Fontaine Fox* v. *Commissioner*, 37 B.T.A. 271 (1938); *Miller-Smith Hosiery Mills* v. *Commissioner*, 22 T.C. No. 75 (1954).

In the recent case of *Coneland Water Co.* v. *United States*, decided by the United States District Court for the Northern District of California, 54-1 U.S.T.C. 9421, the Court said:

> "The fact that the sole shareholder performs for the corporation, paying all its expenses and taking all income, is not grounds for disregarding the corporate entity."

The same rule is applied in a criminal prosecution for tax fraud. In *United States* v. *Cole,* 90 F. Supp. 147 (S.D. Cal. 1950) the court, in granting motion for judgment of acquittal in a tax evasion case, said, at p. 156:

> "The mere fact that Mrs. Cohen was the chief stockholder in the corporation does not destroy the distinction between herself, her estate and the corporation. They are distinct entities. To my mind, the entire confusion in this case arises from the fact that some government investigators—and *I do not question their good faith*—have lost sight of this prime distinction. They have *assumed that everything Mrs. Cohen did, the corporation did, and vice versa.* But there is no warrant for such assumption." (Emphasis by the court).

There was no evidence of record placing additional monies or taxable income in the hands of Mr. Beaty except the discredited and admittedly erroneous net worth and expenditure computations of the Government Agents Parrish and Cline.

The Government Witness Parrish, on cross-examination, admitted that in order to justify additional unreported net income to the corporation, Beaty Service Company, Inc. would have had to operate its taxicabs approximately 100% of the time and that in a period of two years Beaty Service Company would have had to have more cabs than it actually licensed to derive the monies which the Government agents computed as income (R. 177, Vol. I). Parrish admitted that no monies were paid Mr. Beaty from the sales of automobiles (R. 145, Vol. I).

With respect to Lancaster Distributing Company, operated by the individual Pundt, the income of that company was fully reported. Pundt, a Government witness, testified that he paid the income tax on the profits from the business and never paid to or kicked back any part of the profits to Mr. Beaty (R. 121, Vol. I, Minutes of Trial p.

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1141). Beaty received a salary from this business (R. 120, Vol. I, Minutes of Trial p. 1124). The Government concedes that this salary was reported by Mr. Beaty.

The District Court at the trial recognized that the Government was required to prove not only that unreported income was received by Beaty Service Company, Inc. but also that Beaty received such unreported income from the corporation. The Court so charged the jury (Tr. pp. 58, 59). There was no evidence showing that Beaty received any such money either from Beaty Service Company or from Pundt, proprietor of Lancaster.

To meet the burden, the Government attempted to prove by the net worth testimony and computations and by the expenditure computations of the Witness Cline that Beaty had received income which he did not report. If the expenditures and net worth computations were not essential to the Government's case, why was almost the entire evidence of the Government's principal witness Cline devoted to the expenditure cauculations and why was a substantial portion of the other principal Government witness, Parrish, devoted to the net worth calculations?

We again respectfully submit that these expenditure and net worth computations, vital to the Government's case, stand wholly refuted by the testimony of the Government's own witnesses.

We now proceed to a discussion of the reasons for granting a writ of certiorari as set forth in our original petition for a writ to review the previous decision of the Court below, 213 F. (2d) 712 (App., *infra*, p. 45). We most respectfully reassert these reasons in this petition.

V.

The decision of the Court below in approving the warning given by the District Court to the Jury at the very outset of the trial is not in accord with the decision of this Court in *Remmer* v. *United States,* 347 U.S. 227, 74 S. Ct. 450 (March 8, 1954).

In that case this Court emphasized that a juror "must feel free to exercise his functions" without the F.B.I. or anyone else looking over his shoulder. It was highly prejudicial and in violation of the Constitutional rights of this petitioner to a free and impartial trial by jury for the trial judge to admonish the Jury that they might be watched by some agency and "amenable to punishment for having desecrated the oath of your office". (Appendix, infra, p. 66, Minutes of Trial, pp. 53-4.) We respectfully submit that the sanction by the Court of Appeals of the trial court's departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

VI.

The decision of the Court below that the United States District Court for the Western District of North Carolina had jurisdiction is not in accord in principle with the decisions of this Court; is in conflict with the decisions of other circuits and is inconsistent with its own decisions.

The indictment charged in its three counts that the appellant did wilfully and knowingly attempt to defeat and evade a large part of his individual income taxes due and owing to the United States for the calendar years 1945, 1946 and 1947 (R. 2, 3, 4, Vol. I). The dates of the offenses as charged in the three counts were, respectively (R. 2, 3, 4, Vol. I):

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1. On or about March 14th, 1946 with respect to the calendar year 1945.

2. On or about March 15th, 1947 with respect to the calendar year 1946.

3. On or about March 14th, 1948 with respect to the calendar year 1947.

These dates were the dates on which the petitioner filed his income tax returns for the calendar years 1945, 1946, and 1947, which returns are alleged in the indictment to be false and fraudulent.

Thus the question is squarely presented as to whether the offenses of attempting to evade, charged in the indictment, were committed at Greensboro, North Carolina, *where the returns were filed, within the jurisdiction of the United States District Court for the Middle District of North Carolina* or at Charlotte, North Carolina, where the appellant lived and within the jurisdiction of the District Court for the Western District of North Carolina, where he was indicted.

In *United States* v. *Lombardo,* 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897, this Court held that a resident of the State of Washington was guilty of an offense in the City of Washington, District of Columbia, for failing to file with the Commissioner General of Immigration, in the District of Columbia, a statement in writing required by an Act of Congress.

In *Rumely* v. *McCarthy,* 250 U.S. 283, 39 S. Ct. 483, 486, 63 L. Ed. 983, this Court said:

• • • •

> "It is contended, indeed, that there was no probable cause to believe that the offense charged in the Washington indictment was committed within the District of Columbia, and this upon the ground that appellant

was not personally present in the District at the time of the alleged offense, and that he was under no duty to make report there to the Alien Property Custodian. The commissioner, however, found as a matter of fact that the Custodian's office was in the District of Columbia, and as the finding was supported by competent evidence the District Court properly held that it was not reviewable on writ of habeas corpus. That being so, the duty imposed by the statute to make report to the Alien Property Custodian involved the duty to make such report in the District of Columbia, and failure to make it was an offense against the United States committed in that District. United States v. Lombardo, 241 U.S. 73, 76, 36 S. Ct. 508, 60 L. Ed. 897; New York C. & H. R. R. Co. v. United States, 166 F. 267, 269, 92 C.C.A. 331."

• • • •

We believe that the decision of the Court below fails to follow the above decisions by this Court.

The decision of the Court of Appeals is in conflict with the following decisions:

Wampler v. *Snyder, Marshal* (Court of Appeals, D.C.) 62 App. D. C. 215, 66 F. (2d) 195.

United States ex rel Wampler v. *Hill, Warden,* 8 F. Supp. 469, affirmed 74 F. (2d) 920 (Third Circuit).

In *Wampler* v. *Snyder, Marshal,* supra, the Court of Appeals for the District of Columbia said:

• • • •

"The Act provides that the income tax return 'shall be made' to the collector for the district in which is the legal residence of the taxpayer. The office of the Collector, as we have seen, is in the city of Baltimore in the State of Maryland. It is there and nowhere else that the return 'shall be made,' and the mere placing of the return in the mail in Washington city is not a compliance with the statute. The words 'shall be made,' as used in the Statute, are the

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> equivalent of 'shall be filed,' and to file a paper is to deliver it at the place where it is to be lodged and kept. When the mails are utilized for this purpose, the filing takes place upon delivery at the office of the official required to receive it. See United States v. Lombardo (D.C.) 228 F. 980, 982, and cases cited, affirmed 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897."

The decision of the court below is inconsistent with its own decisions in the following cases: *Bowles* v. *United States* (C.A. 4) 73 F. (2d) 772, 774, approving *Wampler* v. *Snyder, Marshal,* supra, and holding that the offense charged was committed where the filing took place.

In *Reass* v. *United States* (C. A. 4) 99 F. (2d) 752, the Court below not only reaffirmed its decision in *Bowles* v. *United States,* supra, but spelled out A. B. C. just what these decisions mean, viz. that the preparation of a return, including the mailing thereof, does not constitute the criminal offense under the statute involved, the crime being committed upon the filing of the return with the Collector.

Shurin v. *United States* (C. A. 4) 164 F. (2d) 566, 569 again reaffirmed *Bowles* v. *United States,* supra, reapproved the doctrine of *Wampler* v. *Snyder, Marshal,* and relied on *Reass* v. *United States,* supra.

We think that the law of the case was correctly stated by the District Court in the *United States* v. *Aaron* and *United States* v. *Bridwell,* 117 F. Supp. 952, 954, as follows:

• • • •

> "The same questions arose in a recent case before Judge Darr in the Eastern District of Tennessee. United States v. Lefkoff, 113 F. Supp. 551, 556. Judge Darr states:
>
> " 'The crimes alleged in the indictment follow closely the language of the statute, 26 U.S.C.A., Page 145(b) and consist of a single act which occurred at

one place and one time and the offense is to be tried only at the one place even though the preparations may occur elsewhere. Reass v. United States, 4 Cir., 99 F. 2d 752; Shurin v. United States, 4 Cir., 164 F. 2d 566; Eisler v. United States, 84 U.S. App. D.C. 404, 176 F. 2d 21; United States v. Newton, D. C., 68 F. Supp. 1952, affirmed, Newton v. United States, 4 Cir., 162 F. 2d 795.'"

• • • •

This accords with the indictment in this case which charges that the offense of attempting to defeat and evade income taxes was committed on the dates the returns were filed at Greensboro within the Middle District of North Carolina and not at Charlotte, within the Western District of North Carolina.

The Court below relied on *Newton* v. *United States* (C. A. 4) 162 F. (2d) 795. However, in that case Newton was not the taxpayer. He did not file a return. He was indicted for aiding and abetting in the preparation of a false and fraudulent return. His offense was entirely performed in the District where the return was prepared.

VII.

The Court below approved the action of the District Court in instructing one juror in the absence of the other eleven as to the propriety of a recommendation for mercy and in promising that he would follow the recommendation.

The proceedings which took place between the District Court and one juror are set forth in the Appendix, infra, page 52. (Cee also R. 534, Vol. I)

The decision of the Court below is in conflict with the recent decision of the Fifth Circuit in *Demetree* v. *United States*, 207 F. (2d) 892, 895.

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It is also inconsistent with the Court of Appeals own decision in *Lovely* v. *United States,* 169 F. (2d) 386, 391.

Please see also *Ryan* v. *United States* (C. A. 8) 99 F. (2d) 864 and *Coward* v. *Commissioner,* 164 Va. 639, 178 S.E. 797.

The Court of Appeals itself stated (App. infra, pp. 62)—

> "• • • Undoubtedly communications between the court and the jury should be made in the presence of all the jurors • • •."

We submit that if the jeopardy of the defendant was to be made the subject of a trade or compromise, he was entitled to have all the jurors hear to what the Court had agreed and the eleven jurors should not have had to rely on the version of the agreement as it came from the lips of a juror who was interested enough to attempt to have a private conversation with the trial judge. (App., infra, p. 62, R. 534, Vol. I)

We know not what the lone juror said to the other members of the jury upon his return to the jury room. However we respectfully submit that the colloquy of the trial judge with the one juror was prejudicial to the rights of petitioner and might well have induced the verdict of the jury which obviously was in doubt. We again submit that the sanctioning by the court below of the action of the trial court calls for an exercise of this Court's power of supervision.

VIII.

The court below held in substance that under Rule 30 of the Federal Rules of Criminal Procedure (referred to by the court in its opinion as Rule 51 (App., infra, p. 60) petitioner's attorneys were required to request of the trial

court that the jury be excluded while petitioner's objections were made to the court's charge.

Every experienced trial lawyer knows that juries are very inquisitive and that they do not like to be excluded from the proceedings in the court room. For defendant's counsel to be required to request at this critical stage of the trial that the Jury be excluded would be highly prejudicial to petitioner's Constitutional right to a fair trial.

Obviously the drafters of Rule 30 of the Federal Rules of Criminal Procedure had this in mind when they adopted the mandatory provision of Rule 30 that "opportunity shall be given to make the objection out of the hearing of the jury"; and undoubtedly they further had in mind some action by a trial court similar to what actually took place here when the Court said to the jury: "Every lawyer who makes contest for a case and prosecutes or defends is zealous. He desires to win. That is the American way, to win, and being desirous of that fact he becomes zealous; * * *" R. 530-531, Vol. I).

It is respectfully submitted that the provisions of Rule 30 are mandatory; that the trial court should have excluded the Jury without the defendant being required to request such exclusion and that it was highly prejudicial to defendant for the Court to tell the jury that counsel was "zealous" as described hereinabove.

The Fourth Circuit Court of Appeals itself correctly stated the rule in a rape case, *Lovely* v. *United States*, 196 F. (2d) 386, 391, as follows:

> "Federal Rules of Criminal Procedure, Rule 30, 18 U.S.C.A. following section 687. Ordinarily, failure to observe the requirements of this rule will be held sufficient ground for granting a new trial, unless it affirmatively appears that no prejudice resulted therefrom; for counsel should not be required in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge."

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The petitioner again respectfully submits that the court below erroneously sanctioned the unusual interpretation by the trial court of the provisions of Rule 30 in an income tax case and the trial court's remarks to the Jury and that this again calls for this Court's power of supervision and the clarification by this Court of Rule 30 as applied to Federal tax cases.

IX.

Rule 30 of the Federal Rules of Criminal Procedure provides "the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, * * *".

Judge Murrah of the Tenth Circuit Court of Appeals in the case of *Downie et al.* v. *Powers et al.*, 193 F. (2d) 760, 766, considered Rule 51 of the Federal Rules of Civil Procedure which rule contains the identical language above quoted and in substance stated that this rule is too plain for misunderstanding and its purpose was to let counsel know what could or could not be argued to the jury and that where the trial court changes its mind after arguments have been made a new trial should be granted, or at least counsel should be given an opportunity to reargue its case. We submit that this is highly important for the reason that where, as in this case, counsel is told what the trial court will charge (R. 488, Vol. I) and relies on that statement of the trial court, there is no more effective way of reducing counsel's argument to a nullity and of depriving the defendant of a fair trial than for the court, in the presence of the jury, to openly state to counsel for the defendant, as was done in this case, that he refused to give the charge on circumstantial evidence (which he had promised to give (R. 488, Vol. I)) for the reason that this was not a case where a charge on circumstantial evidence was required (R. 530, Vol. I).

Rule 30 being so important, we submit that this Court should use its power of supervision and clarify the meaning of the same.

CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE

PAUL R. ERVIN

FRANK W. SNEPP

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APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6760.

KEITH M. BEATY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE.

AFTER VACATION OF JUDGMENT AND REMAND FROM THE SUPREME COURT OF THE UNITED STATES FOR CONSIDERATION.

(Argued March 7, 1955. Decided March 24, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Paul R. Ervin and Llewellyn A. Luce (Frank W. Snepp and W. M. Nicholson on brief) for Appellant, and James M. Baley, Jr., United States Attorney, for Appellee.

SOPER, Circuit Judge:

On January 10, 1955 the Supreme Court of the United States considered petitions for writs of certiorari in this and eight other cases in which the Courts of Appeals had affirmed convictions of attempting to evade and defeat the income tax laws in violation of §145 of the Internal Revenue Code; and the Court vacated the judgments and remanded the cases to the Courts of Appeals for reconsideration in the light of its decisions in four other cases handed down on December 6, 1954, in each of which the prosecution had been based on the net worth method of proof.* The Supreme Court did not consider the merits of the cases remanded nor their relation to its recent opinions, but remanded them in the belief that reexamination by the Courts of Appeals was desirable even in those cases remotely involving the principles it had laid down. See 75 S. Ct. 311. The prior decision of this court in the pending case is found in 213 F. 2d 712.

Accordingly the pending case was set for argument on March 7, with directions to the parties to file briefs restricted to the questions raised in the decisions of the Supreme Court; and in accordance with this order briefs have been filed and counsel have been heard. The principal contention now made on behalf of the defendant is that the Government made use of the net worth method of proof in the District Court but failed to establish "an opening net worth" or the total net value of the taxpayer's assets at the beginning of a given year, as required by the pronouncements of the Supreme Court. One ground for this contention was the introduction in evidence by witnesses for the United States of two statements dated De-

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* *Holland* v. *United States*, 75 S. Ct. 127; *Friedberg* v. *United States*, 75 S. Ct. 138; *Calderon* v. *United States*, 75 S. Ct. 186; *Smith* v. *United States*, 75 S. Ct. 194.

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cember 31, 1944 and June 30, 1946 respectively, which defendant had given to a brewery company as evidence of his financial status in connection with a purchase of merchandise. These statements showed an increase of net worth during the period of eighteen months in the amount of $145,800.10, and they were used as evidence tending to show that the net taxable income of the defendant was greater than that disclosed by his income tax reports for the years under examination.

The defendant contends that these statements were without probative force because it was also shown in the evidence that on May 26, 1943 and again on November 14, 1944 Beaty had deposited with a bank as collateral for loans stock of the value of $252,492, an amount in excess of those shown on the statements; and also because of the testimony of a government agent that he believed that Beaty had stocks in excess of those shown on the list of collateral deposited with the bank. Moreover, it is pointed out that the Government made no investigation as to the value of the stocks at the beginning and the end of the eighteen month period, and hence it is contended that the increase of net worth shown by the statements to the brewery company may have been occasioned by a rise in market prices.

The defendant also refers to the testimony of an internal revenue agent that defendant's expenditures exceeded his income by $32,885.60 in 1945 and $56,695.67 in 1946; and that the agent in making his computation did not take into consideration that the defendant may have had money on hand on January 1, 1945, the beginning of the first year covered by the charges in the indictment, although there was evidence that prior to the indictment years the defendant put up as collateral for a loan with the bank $100,000 at different times, and that $70,000 of this sum

was released on March 20, 1945. The contention of the defendant in this respect is that the increase of expenditures over income during the tax periods may have been attributable to the cash on hand at the beginning of the period. There was, however, additional testimony on the part of the Government that the cash sums referred to were not used in making the expenditures listed in the computation. Reference is made in the prior opinion of this court, 213 F. 2d 712, at p. 720, to the fact that there was no explanation of the use of cash sums as collateral for the payment of cash loans.

In view of the comments of the Supreme Court in its recent decisions upon the need to establish an opening figure in prosecution for tax frauds based upon the net worth method, there would be substance in the defendant's contentions if the Government had depended on this method to sustain the charges contained in the indictment in this case. But the case was not tried on this theory. The revenue agents requested Beaty to furnish a net worth statement but he refused to do so and the agents did not attempt to prepare one themselves. The two statements to the brewery company were made by Beaty in the course of his liquor business and they were offered in evidence, together with testimony as to the excess of expenditures over reported income, and the deposit of large amounts of cash as collateral for bank loans, in corroboration of direct evidence tending to show an intentional failure on the part of the defendant to report his taxable income. The Government's case was built upon this direct testimony, as is shown in the prior opinion of this court. The Government relied on the disparity between the income reported and the income received by Beaty in the Beaty Service Company, and the failure of Beaty to report as his own taxable income the revenues from the Lancaster Distributing Company. There was abundant evidence to

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show that both of these enterprises were corporations in name only and that in each instance the business belonged to Beaty individually and that the income therefrom, which was nominally taken in the corporate name, was in fact taxable to Beaty individually.

There was presented to the jury the typical case of a tax evader engaged in profitable businesses whose records were inadequate and confusing so that it became necessary for the Government agents to make investigations in many places in order to ascertain the actual facts. The agents were able to do this without resorting to the net worth method. They discovered in their investigations convincing evidence that Beaty collected large sums from his taxi and service business which he did not report in either his individual or corporate tax returns in the three years under investigation. It was also shown that during the same period large sales were made in the liquor business and large profits were made which would have substantially increased the taxable income of the defendant if they had been included as they should have been in his individual tax return.

Thus there was sufficient direct evidence of tax evasion on the part of the defendant to take the case to the jury; and the financial statements of net worth made in the course of his liquor business, and the excess of expenditures over reported income were used only as corroborating evidence of his failure to report all of his income for taxation. In this respect the case is somewhat similar to the decision of the Supreme Court in *United States* v. *Calderon*, 75 S. Ct. 186, one of the four decisions made on December 6, 1954, in which the judgment of conviction in the District Court was sustained. There the Government's case rested primarily on a net worth calculation in which the taxpayer was credited with $500 cash on hand at the starting point; but there was not sufficient

evidence of the taxpayer's financial history to substantiate this figure directly. If there had been nothing more, the Government's case would have failed; but the record disclosed independent evidence tending to show that the taxpayer's assets greatly increased at a time when he was receiving large unrecorded amounts of income, and therefore the court concluded that the crime was established by the direct evidence without resort to the net worth method. We come to the same conclusion in this case and therefore, after reexamination of the evidence as directed by the Supreme Court, the judgment of the District Court will be again

affirmed.

JUDGMENT

Filed and Entered March 24, 1955

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6760

KEITH M. BEATY, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

The judgment of this court in this case, affirming the judgment of the District Court on the 14th day of June, 1954, was vacated by the Supreme Court of the United States on January 10, 1955 with direction to reexamine the evidence in the light of *Holland* v. *United States*, 75 S. Ct. 127 and other cases handed down on December 6, 1954. Thereupon, by order of this court passed on January 13, 1955 the parties to the case were directed to file

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additional briefs, and the case was set for argument on March 7, 1955, on which day arguments were heard; and the Court, having given consideration to the briefs and arguments of counsel, and reexamined the evidence, it is hereby ordered this 23rd day of March, 1955, that the judgment of the District Court herein be again

affirmed

JOHN J. PARKER
Chief Judge, U.S.C.A. 4 Cir.

MORRIS A. SOPER
United States Circuit Judge

ARMISTEAD M. DOBIE
United States Circuit Judge

Order Staying Mandate

Filed April 1, 1955

(Style of Court and Title Omitted)

Upon the application of the Appellant, by his counsel, and for good cause shown,

It is ordered that the Mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this Court or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within thirty (30) days from March 24, 1955.

March 30, 1955

JOHN J. PARKER
Chief Judge, Fourth Circuit

Supreme Court of the United States

No. 209, October Term, 1954

KEITH M. BEATY, *Petitioner,*

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Fourth Circuit, and was duly submitted.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Fourth Circuit for consideration in the light of *Holland* v. *United States, Friedberg* v. *United States, Smith* v. *United States,* and *United States* v. *Calderon,* decided by this Court December 6, 1954.

January 10, 1955.

Mr. Justice Black dissents.

A true copy

Test: HAROLD W. WILLEY,
Clerk of the Supreme Court
of the United States

By HUGH W. BARR
Deputy

(Seal)

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6760.

KEITH M. BEATY,
Appellant,
versus
UNITED STATES OF AMERICA,
appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE. CRIMINAL.

(Argued June 1, 1954. Decided June 14, 1954.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

John W. Muskoff and Llewellyn A. Luce (W. M. Nicholson on brief) for Appellant, and James M. Baley, Jr., U. S. Attorney, for Appellee.

SOPER, Circuit Judge:

Keith M. Beaty was convicted of violating Section 145 (b) of the Internal Revenue Code under an indictment in three counts, of which the first count related to the tax year 1945 and charged that the defendant did wilfully and

knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for that year by maintaining or causing to be maintained false books and records, by concealing assets and covering up sources of income, by preparing or causing to be prepared a false income tax return and by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of North Carolina a false and fraudulent income tax return wherein he stated that his net income for the calendar year was the sum of $48,490.98 and that the amount of tax due thereon was the sum of $24,350.55, whereas as he then and there well knew, his net income for the calendar year was $254,701.83 upon which he owed to the United States an income tax of $209,785.06.

The second and third counts in similar terms charged attempts to defeat and evade the income tax for the years 1946 and 1947 alleging in the second count as to 1946 a false and fraudulent return of income of $75,265.42 and a tax due of $42,526.74, whereas the income was $174,715.24 and the tax due was $125,565.03 for the year; and alleging in the third count as to 1947 a false and fraudulent return of income of $48,283.69 and a tax due of $22,937.04, whereas the income was $86,077.04 and the tax due was $50,960.08.

The District Judge entered judgment of imprisonment for two years as to each of the counts of the indictment, the sentences to run concurrently and not consecutively. In addition the court imposed a fine of $10,000 on the first count of the indictment, a fine of $5,000 on the second count, and a fine of $5,000 on the third count, the fines to be cumulative, making a total fine of $20,000, in addition to the court costs.

The principal contentions on this appeal are that the court lacked jurisdiction over the offenses charged in the

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indictment and that the evidence was insufficient to sustain the verdict of the jury. The statute, 26 U.S.C. Int. Rev. Code, Sec. 53(b), requires that the income tax return of an individual shall be made to the collector for the district in which is located the taxpayer's legal residence or principal place of business. Beaty resided and was engaged in several business enterprises in Charlotte, North Carolina, in the Western District of North Carolina, in which the indictment was found and the case was tried; but the office of the Collector (now Director) of Internal Revenue was located in Greensboro, North Carolina, in the Middle District of North Carolina, where the tax returns of the defendant were filed. Hence it is contended that the offenses charged were triable only in the Middle District of North Carolina and the court below was without jurisdiction.

This contention, however, overlooks the fact that the defendant was not indicted for wilfully failing to make returns and pay the taxes in violation of Sec. 145(a), or for making returns which he did not believe to be true and correct as to every material matter, in violation of Section 145(c) of the statute, but for attempting to evade or defeat the payment of the taxes by maintaining false books and records, by concealing assets, and covering up sources of income, and by preparing and filing false and fraudulent income tax returns. It has been held in cases where the charge was confined to an attempt to evade the tax by filing a fraudulent return that the offense was committed where the returns were filed. See the conflicting decisions in *United States* v. *Aaron*, N.D. W.Va., 117 F. Supp. 952, and *United States* v. *Albanese*, S.D. N. Y., 117 F. Supp. 736. The charge in the case at bar, however, includes the making of false records and the concealment of assets, and if any of these acts are proved to have occurred in the Western District of North Carolina, the case is made out and the trial court had jurisdiction.

We have had occasion to consider kindred questions in a number of earlier cases. In *Bowles* v. *United States,* 4 Cir., 73 F. 2d 772, we held that a resident of the District of Columbia, which is part of the Revenue Collection District of Maryland, was triable in the District Court for the District of Maryland for wilful failure to make an income tax return for 1930 and for a wilful attempt to evade the income tax of 1931 by filing a false and fraudulent return. In *Reass* v. *United States,* 4 Cir., 99 F. 2d 752, we held that a defendant indicted for making a false statement to influence the action of a Federal Home Land Bank in Pittsburg, was triable in Pennsylvania where the statement was presented to the bank, and not in Maryland where the statement was prepared, since the essence of the crime was the act of delivering the statement to the bank. In *Newton* v. *United States,* 4 Cir., 162 F. 2d 795, however, we held that a defendant indicted for aiding in the preparation of a false and fraudulent claim in connection with an amended income tax return was triable in the Western District of Virginia where the claim was prepared, although the claim was filed in the office of the Collector of Internal Revenue in Richmond, in the Eastern District of the State. From the decision in the last mentioned case it appears that the crime there under consideration is committed by any person who "aids" or "assists in" the preparation of the return, and that the acts performed by the defendant in the preparation of the return took place in the Western District of Virginia. Resting the decision on this phrase Judge Dobie pointed out: (162 F. 2d 796)

> "All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed? Without the exact language of the statute, particu-

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larly this verb, paraphrases and loose citations in this field are more than inaccurate; they are positively misleading. When, as is so often the case, the statute enumerates several such verbs, only scrupulous, even meticulous, nicety in exact quotation can prevent these statutes, as well as the decisions under them, from proving a snare and a delusion to the unwary."

See also *United States* v. *Johnson,* 319 U.S. 503, 514; *Shurin* v. *United States,* 4 Cir., 164 F. 2d 566. *Cf. United States* v. *United States District Court,* 6 Cir., 209 F. 2d 575.

In *Spies* v. *United States,* 317 U.S. 492, the court held that the wilful failure to make a return and to pay the tax, which are made misdemeanors by Sec. 145(a) of the statute, do not without more constitute attempts to evade or defeat the tax which is made a felony by Sec. 145(b). The court said: (317 U.S. 498, 499)

"The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and

positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."*

We reach the conclusion that the District Court had jurisdiction in the case at bar since the prohibitory words of the statute are directed against "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter," and the proof relates to activities of the defendant performed in the Western District of North Carolina.

Beaty Service Company

In proof of the charges that the defendant attempted to evade payment of the income taxes by maintaining false records and covering up sources of income, the Govern-

* The court did not comment in this case on Sec. 145(c) of the statute which makes it a felony for an individual to make a return which he does not believe to be true and correct in every material manner.

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ment relies particularly upon the disparity between the income reported and the income received by Beaty in the tax years from the enterprises known as Beaty Service Company and Lancaster Distributing Company. The Beaty Service Company was nominally an incorporated body but there was abundant evidence to show that it was in fact Beaty's individual property. Only three qualifying shares of stock were ever issued, one to Beaty, one to his father and one to his brother. No records of corporate activities as such were kept and no dividends were paid. The father died in 1943 and there was no administration on his estate. The brother invested no money in the business and received none therefrom, except a salary.

The operating records of the business were kept in Beaty's office. The bank deposits were made by him and only such monies as he reported to the bookkeeper were recorded. He only was authorized to draw checks upon the bank account. He put up his own securities as bonds, under which the company operated. The employees received instructions from him alone, the corporate income tax returns were signed by him. Aside from the permissible inference that the corporation was only a name, and that the business belonged to Beaty individually, so that the income therefrom should have been included in his personal return, there was evidence to show that Beaty collected income from the business and did not deposit it in the corporate bank account. Receipts from the enterprise consisted of taxicab rentals, bonding fees from cabs owned by individuals who operated under the Beaty bonding system, and proceeds from the sale of automobiles. Taxicab rentals were $10 per day except on Saturdays and Sunday when they were $12 per day, payable at 6 P.M. on each day. During the tax years Beaty operated 32 to 38 cabs. Bonding fees amounted to $7 per week on 20 to 32 additional cabs operated by individual owners. Monies from these sources were placed in envelopes

marked with the number of the cabs and delivered to Beaty's office and counted. Beaty made the deposits in the bank at irregular intervals and delivered duplicate deposit slips or the bank book to the bookkeeper so that entries might be made on the corporate books. No record was retained to indicate how much was received from any individual cab or individual driver, and the envelopes and daily check sheets were destroyed. Hence the only record of income was a cash journal made from the record of bank deposits furnished by Beaty, while the expenses were itemized in detail and receipts and documentary proof retained.

The record of the sales of the cars was also found to be defective. Ten sales which were proved to have been made were not recorded at all and 23 cars were reported to have been sold at prices less than the money actually received therefrom.

Under these circumstances the United States sought to prove the receipts of the business by producing 83 taxi drivers as witnesses who testified as well as they could as to the days they worked and the rental and bonding fees which they paid. The government also checked the reports of operations maintained under the local law by the Police Department of the City and produced an account of the true income prepared by tax accountants. This account tended to show that the income actually received by the Beaty Service Company or by Beaty, which was not reported either in the corporate or individual tax returns, amounted to $55,103.29 in 1945, $32,461.97 in 1946, and $21,696.85 in 1947, or a total of $109,262.11.

Lancaster Distributing Company.

The story of the Lancaster Distributing Company, which can only be given in broad outline, also gives support to the inference that Beaty received taxable income

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in 1945 and 1946 which he did not include in his returns. In the summer of 1944 he induced one E. C. Pundt, an auditor who had previously had charge of the books of the Beaty Service Company, and was a trusted friend, to go into the wholesale whiskey business. Pundt was totally inexperienced in this field and lacked financial means but Beaty promised to back him and accordingly Pundt set up the business in Lancaster, South Carolina, in September of that year. He advanced $7500 in cash, $2500 of his own money and $5,000 which he borrowed from one Passons. The first shipment of goods was received on open account from Sol Feldon of Baltimore, an associate of Beaty. Later shipments of substantial size were purchased with funds borrowed from the American Trust Company on collateral furnished in every case by Beaty which at times amounted to as much as $250,000. Beaty himself made numerous trips to New York and Philadelphia to purchase the goods, Pundt remaining in South Carolina except for a few trips to Philadelphia. Beaty had and exercised the right of drawing checks on the bank account.

The testimony of Pundt as to the ownership of the business was in effect that at the outset he was to be the proprietor and Beaty the backer of the enterprise; but it is evident that Beaty was the monied man and exercised actual control from the beginning. This was made clear by the execution of a document some time after the establishment of the business in September, 1944 and before its subsequent incorporation in March of 1946, wherein it was agreed that Pundt and Passons were to work for the business on a salary basis and Beaty was to have complete control. Pundt's copy of this document was later destroyed but there was no denial of its existence and Pundt himself, during his examination as a witness, declared that it was for some one else to determine the ownership

of the business since he did not know whether he was competent to do so himself.

Moreover, on one occasion Beaty told a whiskey man in Baltimore that the business of the Lancaster Distributing Company was his and that Pundt was running it for him. On another occasion Beaty used an indebtedness due by the business to Feldon as a credit on an indebtedness due by Feldon to him. Again in 1946, when Pundt gave a check for $5,000 to the United States in part payment of income taxes due by the business, Beaty undertook to stop payment on the check.

It is manifest that the jury might well have found that the business belonged to Beaty and that the income therefrom was taxable to him. The evidence indicated a business of substantial size in 1944, 1945 and 1946, from which profits covered by tax returns in Pundt's name were derived. Using approximate figures the sales in 1944 amounted to $400,000 and the profits $24,000; in 1945 the sales amounted to $2,000,000 and the profits $93,000; in 1946 (three and a half months) the sales amounted to $1,000,000 and the profits $37,000. The aggregate income taxes paid for these years amounted to approximately $72,000, leaving a deficit in taxes of $5,000. It appears that the profits were allowed to remain in the business and that no money was paid by Pundt to Beaty other than enough to cover his traveling expenses and a salary which in amount exceeded the salary paid to either Pundt or Passons. Had these profits been reported as the income of Beaty, his taxes would have been substantially increased and would have exceeded the combined taxes paid in his name and in the name of the business. In 1945 the defendant paid an income tax of $24,350.55 but had he included in his income the profits of the Lancaster Distributing Company, his taxes would have amounted to $94,487.05. The personal return of Pundt for the year

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1945 showed taxes of $56,994.41, so that by dividing the income as above indicated, the loss to the government was $13,142.09. The Government suffered a similar loss in the year 1946.

In March, 1946 it was decided to incorporate the business under the same name and the evidence indicates that thereafter the business was unprofitable and the details need not be recited herein. It is sufficient to say that upon incorporation common stock in the sum of $100,000 was subscribed, of which Beaty paid $51,000 in cash and Pundt and Passons $24,500 each, which was borrowed from the American Trust Company on notes endorsed by Beaty. In 1946, when Petrushansky, a Baltimore whiskey dealer, and his auditor came to Charlotte to reconcile an account for merchandise, Beaty gave them to understand that he was the owner of the Lancaster Distributing Company, Inc.

Expert Testimony of Parrish and Cline.

In order to reduce the complicated facts of the Beaty business enterprises to comprehensible form and scope, the government made use of the services of John F. Parrish and R. L. Cline, Treasury Department accountants, and placed them on the stand to explain their investigations and to give their opinion as to the correctness of the defendant's tax returns. It is now objected that Parrish was not qualified as an expert and that it was an invasion of the province of the jury to allow either accountant to express an opinion as to the meaning of the evidence.

There was no error in allowing Parrish to testify as an expert witness. The defendant raised no objection to his qualifications when he was offered as an expert and if there had been objection, it would have been proper to overrule it, for the witness started as an employee of the Government Accounting Office in 1937, later had three

years' experience as an auditor and cost accountant, and after service with the armed services for three and a half years, was appointed Special Agent in the Intelligence Division of the Treasury Department and shortly thereafter was assigned to investigate the defendant's liability under the income tax law. His performances in this case indicate that he knew his business.

Before reaching conclusions in the matter, Parrish carefully examined all the books and records made available to him by the defendant. For example, he studied the books of account and the bank account of the Beaty Service Company, the semi-monthly reports of the business to the Charlotte Police Department signed by Beaty and filed in obedience to a city ordinance, and in the absence of the daily reports of the taxi drivers, which had not been preserved, he interviewed more than one hundred men to ascertain the average rental and bonding fees paid to the company; he also checked the automobile records of the State and the prices paid by the purchasers of the cars. By these means he was able to reconstruct with substantial accuracy the income of the company from these sources and to compare it with the amounts shown on the income tax returns; and in order to make his conclusions easily understood, he prepared charts which were exhibited to the court and jury. The basis of these conclusions was shown by the introduction of the records in evidence and the production on the witness stand of the taxi drivers and car purchasers.

It does not appear that the charts were formally introduced in evidence, but to all intents and purposes they formed a part of the testimony. They were exhibited to the jury, and at the end of the case were taken by the jury to their room to be examined during their deliberations upon the verdict. It is objected that the charts were shown to the jury before the supporting evidence was

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introduced, and that it was improper for them to be taken to the jury room at the end of the trial. Doubtless the more regular procedure would have required the introduction of the supporting evidence before the conclusions of the experts were shown; but this evidence was finally made available, and most of it was produced before the cross examination of the witnesses began. The defendant suffered no prejudice by the order in which the testimony was adduced. There was likewise no impropriety in affording the jury an opportunity to examine the charts before rendering their verdict, since the attorney for the defendant himself consented "to putting any and all of the evidence in" and thereupon the charts were taken to the jury room in the presence of the attorney without objection.

All of the facts hereinbefore recited tending to show that the Lancaster Distributing Company before incorporation was the personal property of Beaty and did not belong to Pundt were also put in evidence independently of the testimony of the expert witness.

The witness Cline in 1945 also undertook an investigation of the Beaty business, and pursued much the same course as Parrish. He also demonstrated that in 1945, 1946 and 1947 Beaty made large expenditures in excess of those reported in his tax returns for these years. It is objected that this evidence was devoid of probative effect because the amount of money in Beaty's possession at the beginning of the period was not shown in the evidence and hence the money expended by him may have been derived from this source. This evidence, however, if not conclusive, was admissible for the light it threw on the defendant's methods of carrying on business. See *Bell* v. *United States*, 4 Cir., 185 F. 2d 302, 310. For example, in 1945 these expenditures included $20,000 deposited as collateral for a loan with the bank; and in the same year the bank

released to the defendant $70,000 in cash which had been placed with the bank prior to 1945 as collateral for a note. No explanation is given for such transactions. In 1946 these expenditures amounted to more than $64,000 including more than $10,000 deposited in cash with the broker, and $51,000 in cash deposited in the bank at the time of the incorporation of the Lancaster Distributing Company.

The trial judge was careful to instruct the jury that they were in no sense bound by the expression of opinion by the expert witnesses, although it was based on substantially all of the evidence adduced in the case. The judge at the conclusion of the Parrish testimony, cautioned the jury that the evidence of Parrish was merely his opinion and consisted of a recapitulation of the figures which the Government contended showed the unreported income of the defendant; that the jury were to accept these opinions only if they were satisfied beyond a reasonable doubt that the opinions were predicated on facts testified to in the evidence; and that if the opinions were not supported by the evidence it was the duty of the jury to disregard them and to base their conclusions upon the evidence which they believed to be true. A similar caution was given to the jury with respect to the expert testimony in the charge of the court at the conclusion of the case. The course followed by the court in this case was in accordance with the established rule. In *United States* v. *Johnson*, 319 U.S. 503, the court was confronted with a question which arose under similar circumstances and said: (319 U.S. 519)

> "• • • No issue was withdrawn from the jury. The correctness or credibility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear and correct that no objection was

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made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules."

Restriction of Cross-Examination

The defendant contends that the judge erred in unduly restricting the cross examination of the Government's expert witness Parrish, and in making improper comments to the jury in so doing. The subject under cross examination at the time that the rulings complained of were made was the investigation that the witness had made of the records kept or filed by the defendant in respect to the operation of the taxicabs of the Beaty Service Company. The purpose was to show that the witness in calculating the time when certain cabs were operating and producing revenue had not made sufficient deductions when the cabs were idle and undergoing repairs. We have examined the transcript of record and we do not find that the defendant's attorney was prevented from bringing out the facts favorable to his case in this or any other respect. Nor

do we find that the judge transgressed his authority in making the comment during the cross examination that the expert could not be blamed for errors in his calculation which were based on records prepared or filed by the defendant.

The cross examination of the witness consumed two and a half days during which he was subjected to a rigorous questioning on every phase of the case. The scope of cross examination is ordinarily discretionary with the trial judge and particularly must this be so when complicated transactions are involved and the cross examination may be drawn out to such an extent as to obscure the object in view. The cross examination of a witness is a matter of right but the trial judge has the power and duty to keep it within a proper limit. We do not find that there was any abuse of this discretion in the pending case. See *Alfred* v. *United States,* 282 U.S. 687, 694; *Bell* v. *United States,* 4 Cir., 185 F. 2d 302, 310; *Beaty* v. *United States,* 4 Cir., 203 Fed. 652, 656; *Garber* v. *United States,* 6 Cir., 145 F. 2d 966, 970; *Pullman Co.* v. *Hall,* 4 Cir., 55 F. 2d 139, 141.

Objections to the Charge in the Presence of the Jury.

The defendant also contends that at the close of the judge's charge his attorneys were required to state their objections to the charge in the presence of the jury in violation of Rule 51 of the Federal Rules of Criminal Procedure, which directs that an opportunity shall be given to counsel to make their objections to the charge in a criminal case out of the hearing of the jury.

The judge in the pending case, at the end of his charge, inquired whether the attorneys desired any further instructions. The defendant's attorneys suggested that the court had failed to mention certain matters of evidence

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and had not instructed the jury as to the rules governing circumstantial evidence although he had previously indicated that he would give an instruction on this point. The court thereupon stated that a charge on circumstantial evidence was not required in the case, but made certain additions to the charge. He then inquired again whether the defendant had any additional objections to the charge. At no time did the attorneys for the defendant request that the jury be excluded during the discussion of the charge and they do not now indicate that they were in any way prejudiced by the discussion which took place in the jury's presence. Under these circumstances the failure of the court to exclude the jury did not constitute reversible error.

There was no error in refusing a requested instruction of the defendant on the subject of circumstantial evidence. In the request it was stated that the United States relied in the case upon circumstantial evidence and that if the evidence as to any essential element was circumstantial only, it must be of such a character as to exclude every reasonable hypothesis except that of guilt; and if it was not, the defendant should be acquitted. The instruction as offered was too broad because it implied that the case of the Government was based substantially on circumstantial evidence whereas a great part of the evidence was direct. Moreover, the charge of the court was so clear as to the doctrine of reasonable doubt that the jury could not have been misled by the failure to have a charge expressly directed to evidence circumstantial in character. The judge not only called the attention of the jury to the need to be satisfied beyond a reasonable doubt during the course of the taking of the testimony, but at the end of the case instructed the jury that the burden was on the Government to prove the case; and that the income taxes due by Beaty during the years 1945, 1946, and 1947, as

charged in the indictment, must be shown to have been due by him beyond a reasonable doubt; and that the jury must be satisfied also beyond a reasonable doubt that Beaty wilfully and knowingly attempted to evade his income tax obligations to the United States. We are satisfied that the defendant was given every instruction to which he was entitled.

There was no error in the words of caution addressed to the jury at the beginning of the case when the judge warned the jury not to talk about the case to members of their family or any one else, and that they should bear in mind that they might be watched by some agency that had in mind the prime purpose of seeing that a fair verdict should be rendered. The case was doubtless much in the public eye due to the variety and extent of the activities of the defendant in the community and the actions of the jury during the long trial were necessarily more or less in the public eye. We do not find that there was any prejudice to the defendant in this action.

Nor do we find that there was prejudicial error at the conclusion of the case when the foreman of the jury was permitted to come alone into the court room from the adjoining jury room and to ask of the court whether a recommendation could be made by the jury in favor of the defendant because of the condition of his health. To this the court replied that a recommendation on the part of the jury was always proper and would be considered by the court. This occurrence took place after the jury had the case under consideration for a considerable period of time, and thereafter the jury returned a verdict of guilty with a recommendation of mercy. Undoubtedly communications between the court and the jury should be made in the presence of all of the jurors: but it is manifest that the communication of the court to the foreman of the jury in this case was reported by him to his col-

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leagues and that the defendant was in no way prejudiced by the jurors' recommendation, as will appear from the fact that the judgment of the court, insofar as imprisonment is concerned, was limited to two years on each count, to run concurrently.

Affirmed.

JUDGMENT.

Filed and Entered June 14, 1954

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6760

Keith M. Beaty, Appellant,

vs.

United States of America, Appellee.

APPEAL FROM the United States District Court for the Western District of North Carolina

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THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 14, 1954.

MORRIS A. SOPER
United States Circuit Judge.

Title 28, United States Code, 1952 Edition:

Section 1254. Courts of Appeals; certiorari; appeal; certified

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

Internal Revenue Code, Title 26:

Sec. 145(b). Penalties.

"Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U.S.C. 1946 ed., Sec. 145 (b)')."

Sec. 53 (b).

"(b) To Whom Return Made.—

"(1) Individuals.—Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland."

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AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rules of Criminal Procedure: (18 U.S.C.A. following Section 687)

Rule 30. Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Federal Rules of Civil Procedure: (28 U.S.C.A. following Section 723)

Rule 51.—Instructions to jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the

jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

PROCEEDINGS

(Instructions to Jury)

* * * *

"* * * You know not but what you may be watched by some agency that has in mind the prime purpose of seeing that a fair verdict is rendered in this case. We want everybody to have that, and nothing else and nothing more. Your verdict is to be spoken if and when you have heard all the evidence and you ultimately agree upon what you believe the truth is.

"So, if there would be anyone who would undertake in some way or another to speak to you, you be sure and you be certain that you get his name to the extent that even if you are compelled to take him in possession under your own force and hold him until you are heard, or until you can secure aid to have that individual brought before the Court. Don't you let anyone talk to you. Don't talk to your family or to your wife or to anybody else about the case, for I say to you that you might be watched, and if such should occur, then you, as a member of the jury, likewise would be amenable to punishment for having desecrated the oath of your office."

* * * *

(Minutes of trial, pages 53 and 54.)

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"THE COURT: You have examined all of these records, have you not?

"THE WITNESS: Yes, sir.

"THE COURT: OVERRULED.

"THE WITNESS: From the examination of these records and inquiry of the individual drivers that they listed as operating those taxicabs, that is the determination.

"Q (By Mr. Beaty) Now, Mr. Parrish, did you make a similar determination for the year 1946, with the amounts set out on the chart?

"A Yes, sir. Those were arrived at in the identical way as those explained in the previous year, 1945.

"MR. LUCE: I MOVE TO STRIKE those figures, Your Honor, on this ground, that they are obviously based on hearsay from the drivers unless it is only accepted as his opinion of what is due and nothing more.

"THE COURT: I am letting it go in on the theory that they are based on examination of the various records on which income is alleged to be due and in his opinion those amounts were understated in the sum set out there. That is the theory. OVERRULED.

"Q (By Mr. Baley) Now, then, in your opinion, from the examination which you have narrated during the course of your testimony, Mr. Beaty failed to report $142,402.94 for the year 1945?

"A That is correct.

"Q Upon which he owed an additional tax of $125,629.33?

"A That is correct.

"Q For the year 1946, he failed to report $80,328.17, upon which he owed a tax of $66,774.78.

"MR. NICHOLSON: Your Honor, I OBJECT to the

form of that question. He is just testifying. Let the witness tell what is going on up there on that screen.

"THE COURT: He is asking him if those are the figures?

"MR. NICHOLSON: He is repeating before the jury there. I OBJECT to it.

"MR. BALEY: And for the year 1947, Mr. Beaty failed to report additional income of $21,161.12, upon which he owed $15,183.56.

"MR. NICHOLSON: OBJECTION.

"THE COURT: Is that what you would testify to, repeating the question?

"THE WITNESS: Yes, sir.

"THE COURT: All right. It would be best, Mr. Baley, to ask him the questions and let him give the jury the figures, because he, after all, is the one testifying."

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(Minutes of trial, pages 120, 121, 122.)

(Note: Typographical error in Minutes. Examiner should be spelled "Baley" rather than "Beaty".)

PROCEEDINGS

"THE COURT: If you will, tell the jury to come in, please sir.

"THE MARSHAL: Just the Foreman, sir. The Foreman asked to see you, sir.

"THE COURT: (As the foreman speaks to the Court) It will have to be a public statement.

"FOREMAN CARRIKER: Can any recommendation be made on—

"THE COURT: State that out loud, please sir.

"FOREMAN CARRIKER: I just want to know of the Court if any recommendation can be made because of health conditions.

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"THE COURT: A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court.

"FOREMAN CARRIKER: Thank you, sir.

(Whereupon the Foreman retired to the jury room.)

(R. 534-535.)